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**DEPARTMENT OF ENVIRONMENTAL PROTECTION
RESPONSE TO PUBLIC COMMENTS ON 314 CMR 19.00**

Introduction

On February 24, 2005, the Department of Environmental Protection ("DEP") held a public hearing on making permanent its emergency Oil Spill Prevention and Response Regulations at 314 CMR 19.00, promulgated by DEP on December 30, 2004.

314 CMR 19.00 implements a requirement of St. 2004, c.251, as amended by St. 2004, c.457, s.1 (the "Oil Spill Act") that provides, effective January 1, 2005, no tank vessel that is carrying 6,000 or more barrels of oil and is not self-propelled shall enter or transit designated areas of special interest within waters of the Commonwealth, unless such vessel is accompanied by a tugboat escort. This regulation also authorizes DEP to allow a regulated tank vessel to enter or transit an area of special interest without a tugboat escort, or accompanied by a tugboat that does not meet the statutory and regulatory definition of a tugboat escort where DEP determines that such transit is warranted due to exigent circumstances.

The February 24, 2005 public hearing on 314 CMR 19.00 was held at the New Bedford Whaling Museum, 18 Johnny Cake Hill, New Bedford, MA 02740-6398. DEP also accepted written public comments through March 3, 2005. DEP received public comments on 314 CMR 19.00 from the following:

- Senator Robert O'Leary;
- The Coalition for Buzzards Bay;
- Boston Coastwise Pilots;
- B. Paul Bushueff, Jr., Esquire;
- Frank Haggerty;
- Captain John Gibbons;
- John Kauffman; and
- Clean Power Now.

DEP has made several revisions to 314 CMR 19.00 based on its consideration of the public comments. The final version of 314 CMR 19.00, effective March 25, 2005, can be viewed at <http://mass.gov/dep/cleanup/laws/spillact.htm>.

This information is available in alternate format. Call Debra Doherty, ADA Coordinator at 617-292-5565. TDD Service - 1-800-298-2207.

DEP on the World Wide Web: <http://www.mass.gov/dep>

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DEP's Response to Public Comments

1. Senator Robert O'Leary

Senator O'Leary expressed strong support for the tug escort requirement in the Oil Spill Act and 314 CMR 19.00.

DEP Response:

DEP is adopting 314 CMR 19.00 on a permanent basis, effective March 25, 2005, as supported by Senator O'Leary.

2. The Coalition for Buzzards Bay

Ben Bryant and Sue Reid both submitted similar written comments on behalf of the Coalition for Buzzards Bay (the "Coalition"). Ben Bryant also testified on behalf of the Coalition at the public hearing. The Coalition believes that the tug escort requirement provides some of the most significant safety benefits in the Oil Spill Act, and is most likely to actually prevent a future spill. The Coalition regards DEP's regulations for the most part as providing an "excellent framework" for granting exemptions from the tug escort requirement. However, the Coalition urges DEP to delete the phrase "other unique circumstances" from the exemption criteria in 19.03(1)(b)(3).

The Coalition also encourages DEP to specifically indicate in 19.03(1)(b) that when DEP grants a tug escort waiver, it may require a vessel operator to share a tug escort with another vessel that is transiting the same waterway at the same time. Finally, the Coalition identified a correction to the definition of "tank barge" in 19.02.

DEP Response:

DEP has amended the phrase "other unique circumstances" in 19.03(1)(b)(3) to read "other *exigent* circumstances." This change conforms to the language in the December, 2004 amendment to the Oil Spill Act that authorizes DEP to grant a waiver to the tug escort requirement where DEP determines that such a waiver is warranted due to "exigent" circumstances. Thus, DEP has amended 19.03(1)(b)(3) to more accurately reflect the scope of discretion conferred on DEP under the Oil Spill Act. To date, DEP has not granted a waiver to the tug escort requirement.

DEP concurs with the Coalition that there is a value in making explicit in 314 CMR 19.03(1)(b) that DEP has the authority, when granting a waiver to the tug escort requirement, to require vessels to share a tug escort. DEP has essentially adopted the language proposed by the Coalition to make this change. Finally, DEP has corrected the definition of "tank barge".

3. Boston Coastwise Pilots

Boston Coastwise Pilots (“BCP”) opposes the tug escort requirement in the Oil Spill Act and 314 CMR 19.00, believing it to be unnecessary and expensive. From BCP’s standpoint, a better alternative would be to station two to three rescue tugs in the area. BCP also asserts that there has been less traffic in Buzzards Bay since the tug escort requirement went into effect on January 1, 2005. If the tug escort requirement remains in effect, BCP believes that the requirement that tug escorts have 4,000 horsepower is not needed to escort a small tug-barge. Instead, a graduated horsepower requirement should be looked at for the tug escorts.

DEP Response

The use of 4,000 horsepower tug escorts in areas of special interest is an express requirement of the Oil Spill Act, and, thus, is properly included in DEP’s regulation. DEP’s implementation of other aspects of the tug escort requirement in 314 CMR 19.00 is also in accordance with the Oil Spill Act.

4. B. Paul Bushueff, Jr., Esquire

Mr. Bushueff strongly urges DEP to permanently promulgate 314 CMR 19.00 for a number of navigational safety reasons. He also asked DEP to consider in the future a requirement that the tug escort be tethered to the tug-barge when transiting the Cape Cod Canal.

DEP Response

DEP is promulgating 314 CMR 19.00 on a permanent basis, as supported by Mr. Bushueff. DEP does not have sufficient information at this time to conclude that 314 CMR 19.00 should be amended to require that the tug escort be tethered to a tug-barge when transiting the Cape Cod Canal.

5. Frank Haggerty

Mr. Haggerty provided oral testimony at the public hearing. He noted that Leisure Shore Beach in Mattapoisit, MA was closed as a result of the Bouchard oil spill in April, 2003. Mr. Haggerty also opposes the inclusion of the phrase “other unique circumstances” in the tugboat escort exemption criteria in 19.03(1)(b)(3) as being overly broad. Finally, Mr. Haggerty expressed his objection to the Coast Guard’s action of seeking public comments on the pros and cons of amending its regulations to require additional navigational safety measures within Buzzards Bay, and then subsequently suing the Commonwealth regarding the validity of the Oil Spill Act.

DEP Response

For the reasons stated above in response to the Coalition’s comment, DEP has amended the phrase “other unique circumstances” in 19.03(1)(b)(3) to read “other *exigent* circumstances.”

DEP notes that it submitted public comments on the Coast Guard's proposed rulemaking process urging the Coast Guard to adopt regulations that mirror the requirements of the MA Oil Spill Act.

6. Captain John Gibbons

Captain Gibbons, the Pilot Commissioner for District 3 (Buzzards Bay and Vineyard Sound), regards the use of tug escorts as essential at times. He cited as an example a prior incident when the towing tug got run over by its barge in the middle of the land cut. Captain Gibbons recommends several other navigational safety rules such as the use of a look-out and traffic separation schemes, and adherence to a safe speed. He also identified a specific location in Buzzards Bay that might work for a tug escort to meet a tug-barge. Finally, Captain Gibbons provided the titles of three books that provide relevant information on tugs and navigational safety.

DEP Response

DEP is promulgating 314 CMR 19.00 on a permanent basis, as supported by Captain Gibbons. DEP also appreciates Captain Gibbons' feedback on the above matters. As noted in DEP response to the Coalition, DEP is amending 314 CMR 19.03(1)(b) to give DEP the option, when granting a waiver to the tug escort requirement, of requiring vessels to share a tug escort. At the present time, DEP is satisfied that 314 CMR 19.00, as amended, adequately regulates the use of tug escorts.

7. John Kauffman

Mr. Kauffman, an employee of Boston Coastwise Pilots, submitted separate written comments. He believes that the need for the discretion to waive the tug escort requirement is "absolute," and that tug escorts will not address the cause of past oil spills, which have resulted from human error and the lack of experience in local waters. In addition, fees for tug escorts should be based on the size and construction of the tug-barge - e.g., whether such vessels are double hull or connected together like a ship (an "ATB" or "ITB" barge). He stated that the fee for a tug escort is \$4,500 per transit, regardless of the size of the tug-barge. This cost is prohibitive for the smaller tug-barges and ultimately passed on to the consumer. Mr. Kauffman also opined that ATB/ITB barges should be exempt from the tug escort requirement and that the horsepower capacity of tug escort should be scaled to the size of the tug-barge.

DEP Response

DEP's implementation of the tug escort requirement in 314 CMR 19.00 is in accordance with the Oil Spill Act, which grants DEP the discretion to waive the use of a tug escort in exigent circumstances. The only type of vessel that is categorically exempt from the tug escort requirement under the Oil Spill Act is a self-propelled tank vessel. While more securely connected, "ATB" or "ITB" barges are not self-propelled vessels and, therefore, require a tug escort under the Oil Spill Act. Similarly, the definition of a tug escort in the Oil Spill requires all tug escorts to have 4000 horsepower, regardless of the size of the tug-barge being escorted.

Finally, the fees that are charged by a private tug escort provider are not subject to regulation under 314 CMR 19.00.

8. Clean Power Now

Jim Liedell and Inge Perreault, representing Clean Power Now, both provided oral testimony at the public hearing. Both testified to the environmental damage caused by the Bouchard oil spill in 2003 to beaches and West Island, and oppose any regulatory “loopholes” to the tug escort requirement. They opined that the Bouchard oil spill and the threat of future oil spills underscore MA’s need to reduce its dependency on oil as an energy source and advocated for the construction of the proposed wind farm in Nantucket Sound as one means of addressing this issue.

DEP Response

As stated in response to comments by the Coalition for Buzzards Bay, DEP has revised 19.03(1)(b)(3) to conform the regulation to the December, 2004 amendment to the Oil Spill Act. The Act authorizes DEP to waive the tug escort requirement where DEP determines that such a waiver is warranted due to “exigent” circumstances. Accordingly, DEP’s oil spill regulations accurately reflect the scope of discretion conferred on DEP under the law. To date, DEP has not granted a waiver to the tug escort requirement. Finally, DEP notes that the proposed wind farm is subject to different set of federal and state regulations and permitting requirements.